

No. 34399

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**MICHAEL BLANKENSHIP and
MISTY BLANKENSHIP,**

Plaintiffs Below,

v.

**BOSTON CULINARY GROUP, INC.
d/b/a DISTINCTIVE GOURMET,**

Defendant/Third-Party Plaintiff Below,

v.

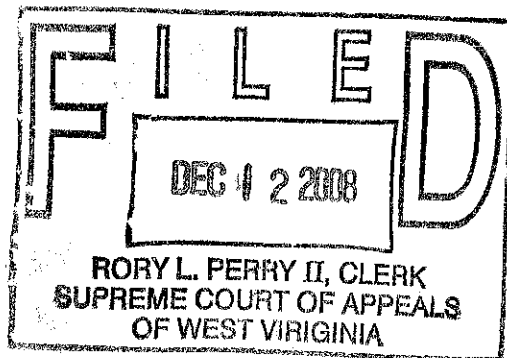
LAKEWOOD SWIM CLUB, INC.,

**Third-Party Defendant/
Fourth-Party Plaintiff Below, Appellant Herein**

v.

EVANSTON INSURANCE COMPANY,

Fourth-Party Defendant Below, Appellee Herein



**From the Circuit Court of Kanawha County
The Honorable James C. Stucky
Civil Action No. 06-C-2062**

BRIEF OF APPELLEE EVANSTON INSURANCE COMPANY

John F. McCuskey (WV Bar #2431)
Heather B. Osborn (WV Bar #9074)
SHUMAN, MCCUSKEY & SLICER, PLLC
Street: 1411 Virginia Street East, Suite 200 (25301)
Post Office Box 3953
Charleston, West Virginia 25339
(304) 345-1400
(304) 343-1826 (fax)
Counsel for Appellee Evanston Insurance Company

I. RESPONSE TO APPELLANT'S STATEMENT OF FACTS

This action arises out of a slip and fall that plaintiff Michael Blankenship sustained on October 14, 2005, during a Rascal Flatts concert at the Charleston Civic Center. Specifically, plaintiff alleges that he was injured when he slipped on beer spilled at or near a "beer booth"/concession stand. Plaintiff filed suit against the City of Charleston and Boston Culinary Group, d/b/a Distinctive Gourmet ["Boston Culinary Group"] alleging that these defendants negligently operated beer concession stands during the concert.

Boston Culinary Group, in turn, joined Appellant Lakewood Swim Club, Inc. [hereinafter "Lakewood" or "Appellant"] as a third-party defendant, on the basis that it was Lakewood that was operating the subject beer booth at the time of plaintiff's fall and, pursuant to a purported contract with Boston Culinary Group, Lakewood had agreed to indemnify Boston Culinary Group for claims such as that asserted by plaintiff herein. Plaintiffs subsequently amended their Complaint to directly assert a cause of action against Lakewood, alleging that the swim club was negligent in its operation of the subject beer booth.

At the outset, it must be noted that Lakewood is not a party to the contract relative to operation of the subject beer booth. Specifically, Boston Culinary Group entered into a contract with the *St. Albans High School Swim Team*, pursuant to which the high school swim team agreed to operate a concession stand on October 14, 2005, during the Rascal Flatts concert. See Non Profit Group Agreement, attached hereto as **Exhibit A**. There is no contract between Boston Culinary Group and Lakewood relative to the operation of any concession stand at the Civic Center.¹ The lack of a contract between Boston Culinary Group and Lakewood is relevant to Evanston's denial of

¹The undersigned counsel requested from Boston Culinary Group any and all contracts between it and Lakewood. Counsel for Boston Culinary Group responded that the only contract in existence relative to the October 14, 2005, concert is the contract between Boston Culinary Group and the St. Albans High School Swim Team.

coverage for the express indemnification claim asserted by Boston Culinary Group and was asserted as a basis for denial in the declination of coverage issued to Lakewood on July 30, 2007. Further, the lack of a contract between Boston Culinary Group and Lakewood is relevant to contradict Lakewood's argument that it routinely operated concession stands such as this as part of its fund raising activities.

During his deposition in this matter,² Tim Quinlan, Lakewood's treasurer, provided testimony regarding the subject contract. In that regard, he testified that those individuals who operated the beer booth on October 14, 2005, did so in the name of Lakewood because the booth could not be operated in the name of the actual party to the contract, the St. Albans High School Swim Team, inasmuch as the booth sold alcohol. *See* deposition of Tim Quinlan at 35-36, attached hereto as **Exhibit B**. Significantly, Mr. Quinlan was asked whether Lakewood has a filing system relative to contracts that it enters into for fund raising activities. Mr. Quinlan responded that "[w]e don't have any of those types of contracts." *See Exhibit B* at 41. Mr. Quinlan further testified that "[w]e don't do fund raisers very often with the exception of this. We haven't done any since then." *Id.* Notably, Jackie Berry, who was the St. Albans High School Swim Team Coordinator, suggested to members of Lakewood that they operate the beer booth on October 14, 2005. Ms. Berry's son is a member of the St. Albans High School Swim Team. *See Exhibit A; Exhibit B* at 58-59.

At the time of plaintiff's accident, Lakewood was insured by Evanston pursuant to policy number CL470100500-01. *See* policy attached hereto as **Exhibit C**.³ Lakewood subsequently

²Mr. Quinlan was deposed prior to the joinder of Evanston as a party to this litigation.

³ The Appellant has designated the entire record of the lower court. A complete copy of the entire Policy is attached as an Exhibit to Evanston's Memorandum of Law in Support of Motion for Summary Judgment. Due to page limit constraints, an abbreviated version of the Policy is attached hereto as **Exhibit C**.

sought coverage from Evanston for the claims asserted against it, arising out of plaintiff's slip and fall.

The Evanston commercial general liability policy contains Endorsement M/E-217 (11/99), which provides as follows:

SPECIFIED/DESIGNATED PREMISES/PROJECT LIMITATION

THIS ENDORSEMENT CHANGES THE POLICY.

Schedule

Premises:

LAKEWOOD DR.
ST ALBANS WV 25177

Project:

PRIVATE SWIM CLUB

(Complete above if information different than that shown in the Declarations)

This insurance applies only to "bodily injury", "property damage", "personal injury", "advertising injury" and medical expenses arising out of:

1. The ownership, maintenance or use of the premises shown in the Schedule (or Declarations); or
2. The *project* shown in the Schedule (or Declarations). (emphasis added.)

See Policy Endorsement M/E-217 (11/99), attached separately as **Exhibit D**.

Lakewood issued a denial of coverage, based upon West Virginia law and its policy language, including, but not limited to, the above-referenced Endorsement M/E-217 (11/99). Specifically, among the reasons set forth by Evanston for its denial, is that plaintiff's alleged bodily injuries did not arise out of the designated project – the private swim club – as required by the clear, plain and unambiguous language of the policy.

Thereafter, Lakewood filed a Fourth Party Complaint against Evanston, arising out of Evanston's denial of insurance coverage for the claims herein. Specifically, Lakewood sought a declaration by the Circuit Court regarding Evanston's duty to defend and indemnify Lakewood relative to plaintiff's slip and fall claim.

Inasmuch as the question of coverage under the Evanston policy is a question of law, and there were no disputed material facts, both Lakewood and Evanston submitted their respective Motions for Summary Judgment on the coverage issue. In its Motion for Summary Judgment, Evanston asserted that there is no coverage for the claims against Lakewood, arising out of plaintiff's alleged slip and fall in beer during a country music concert, based on the clear, plain and unambiguous policy language. Further, by putting forth the policy application completed by Lakewood's agent, Tim Quinlan, Evanston conclusively established that Lakewood had no reasonable expectation of coverage for bodily injury allegedly arising out of Lakewood's operation of a beer concession stand at the Charleston Civic Center during a country music concert. Specifically, Mr. Quinlan, acting on behalf of Lakewood, completed and signed an application for the Evanston policy in 2005, which application was appended to Evanston's Motion for Summary Judgment. The contents of that application have not been disputed by Lakewood. Pursuant to the application, Lakewood made the following representations as to the scope and nature of the project to be insured:

- a. The application specifically inquired whether any outside events were sponsored by the swim club, to which Mr. Quinlan responded, "no."
- b. The application further inquired whether the swim club engaged in any special events on or off the swim club premises, to which Mr. Quinlan again responded, "no."

- c. The application completed and signed by Tim Quinlan, on behalf of Lakewood Swim Club, inquired whether there was a snack bar *on the swim club premises*, to which Mr. Quinlan responded, "yes."
- d. Pursuant to the application, Mr. Quinlan, on behalf of Lakewood Swim Club, advised Evanston Insurance Company that no alcohol was permitted around the pool.

See application, including "Swim and Racquet Club Supplement," attached hereto as **Exhibit E**.

It must be noted that Lakewood failed to file a Response to Evanston's Motion for Summary Judgment. As such, Lakewood failed to provide the Circuit Court with any affidavits or other evidence to show that Lakewood's agent misunderstood and/or misinterpreted the application questions, or to otherwise dispute the contents of the application or to contend that the application questions were ambiguous. Evanston's position with regard to the information provided by Lakewood during the application process was unchallenged below.

Following a hearing on the parties' cross Motions for Summary Judgment, Judge Stucky requested that the parties submit proposed Orders, with findings of fact and conclusions of law. By Order dated December 11, 2007, Judge Stucky granted Evanston's Motion for Summary Judgment, thereby dismissing the Fourth-Party Complaint in its entirety.

II. RESPONSES TO ASSIGNMENTS OF ERROR

- 1. The Circuit Court was plainly correct in granting summary judgment in favor of Evanston Insurance Company and against Lakewood Swim Club, thereby holding that Evanston Insurance Company owed no duty to indemnify Lakewood Swim Club relative to plaintiff's slip and fall claim.
- 2. The Circuit Court was plainly correct in granting summary judgment in favor of Evanston Insurance Company and against Lakewood Swim Club, thereby holding that Evanston Insurance Company owed no duty to defend Lakewood Swim Club relative to plaintiff's slip and fall claim.

III. AUTHORITIES RELIED UPON

CASES

<i>Tennant v. Smallwood</i> , 211 W.Va. 703, 568 S.E.2d 10 (2002)	6, 14
<i>Soliva v. Shand, Morahan & Co.</i> , 176 W.Va. 430, 345 S.E.2d 33 (1986)	7, 14
<i>Keffer v. Prudential Ins. Co.</i> , 153 W.Va. 813, 172 S.E.2d 714 (1970)	7, 14
<i>Burgess v. Porterfield</i> , 196 W.Va. 178, 469 S.E.2d 114 (1996)	7
<i>Conley v. Johnson</i> , 213 W.Va. 251, 580 S.E.2d 865 (2003)	7
<i>Absure, Inc. v. Huffman</i> , 213 W.Va. 651, 584 S.E.2d 507 (2003)	7
<i>Horace Mann Ins. Co. v. Leeber</i> , 180 W.Va. 375, 378, 376 S.E.2d 581, 584 (1988) ...	16
<i>West Virginia Fire & Cas. Co. v. Stanley</i> , 216 W.Va. 40, 602 S.E.2d 483 (2004)	16

RULE

<i>W.Va.R.C.P.</i> 56(b)	14
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IV. DISCUSSION OF LAW

The undisputed material facts clearly establish that Evanston has no duty to indemnify and/or defend Lakewood against the claims asserted against it by the plaintiffs. Plaintiff Michael Blankenship's alleged bodily injury did not arise out of the designated project – the private swim club – as required by the clear, plain and unambiguous policy language. Therefore, Evanston's denial of coverage was proper and the Circuit Court was plainly correct in granting summary judgment in favor of Evanston. The Order of December 11, 2007, should be affirmed.

Determination of the proper coverage of an insurance contract, when the facts are not in dispute, is a question of law. Syl. Pt. 1, *Tennant v. Smallwood*, 211 W.Va. 703, 568 S.E.2d 10

(2002). Moreover, language in an insurance policy should be given its plain, ordinary meaning. Syl. Pt. 1, *Soliva v. Shand, Morahan & Co.*, 176 W.Va. 430, 345 S.E.2d 33 (1986). Where the provisions in an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended. *Keffer v. Prudential Ins. Co.*, 153 W.Va. 813, 172 S.E.2d 714 (1970).

A. Standard of Review

The Supreme Court of Appeals of West Virginia shall review the circuit court's final order and ultimate disposition under an abuse of discretion standard. The Court shall review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*. Syl. Pt. 4, *Burgess v. Porterfield*, 196 W.Va. 178, 469 S.E.2d 114 (1996); *Conley v. Johnson*, 213 W.Va. 251, 580 S.E.2d 865 (2003); *Absure, Inc. v. Huffman*, 213 W.Va. 651, 584 S.E.2d 507 (2003).

B. The Circuit Court was correct in finding that Evanston has no duty to indemnify Lakewood Swim Club against plaintiff's slip and fall claim, inasmuch as the bodily injury that is the subject of this litigation did not arise out of the designated project, as required by the policy.

The Circuit Court was correct in finding that the subject Evanston policy does not provide coverage for the claims asserted against Lakewood either by the plaintiffs or defendant Boston Culinary Group because the bodily injury plaintiff allegedly sustained during a slip and fall in beer at the Charleston Civic Center did not arise out of the designated project – the private swim club.

Therefore, Judge Stucky's December 11, 2007, Order should be AFFIRMED.

1. The Specified/Designated Premises/Project Limitation Endorsement to the Evanston policy unambiguously limits coverage to bodily injury either arising out of the ownership, maintenance or use of the swim club premises or arising out of the project – the private swim club.

Endorsement M/E-217 (11/99), which forms a part of, and modifies, Evanston policy number CL470100500-01, provides as follows:

SPECIFIED/DESIGNATED PREMISES/PROJECT LIMITATION

THIS ENDORSEMENT CHANGES THE POLICY.

Schedule

Premises:

LAKEWOOD DR.
ST ALBANS WV 25177

Project:

PRIVATE SWIM CLUB

(Complete above if information different than that shown in the Declarations)

This insurance applies only to "bodily injury", "property damage", "personal injury", "advertising injury" and medical expenses arising out of:

1. The ownership, maintenance or use of the premises shown in the Schedule (or Declarations); or
2. The *project* shown in the Schedule (or Declarations). (emphasis added.)

See Exhibit D.

As set forth above, at the time of plaintiff's injury, members of Lakewood were allegedly operating a beer booth at the Charleston Civic Center, during a Rascal Flatts concert. In order for coverage to exist under the Evanston policy for the bodily injury claim asserted against Lakewood by plaintiff, plaintiff's bodily injury must have arisen out of the project designated in the above-referenced endorsement - PRIVATE SWIM CLUB. The Circuit Court was correct in finding that plaintiff's injury did not arise out of the designated project.

The endorsement indicates that the insured project is the private swim club. There is absolutely nothing to indicate that the insured project includes the performance of activities that are foreign to the operation of a private swim club, such as the operation of a beer booth at the

Charleston Civic Center during a country music concert. The deposition testimony of Tim Quinlan evidences the fact that the operation of beer booths was not an ordinary function of the swim club, inasmuch as Mr. Quinlan testified that Lakewood has not entered into any contracts for the operation of beer booths or concession stands. In fact, the contract relative to the operation of the beer booth on October 14, 2005, was between Boston Culinary Group and the St. Albans High School Swim Team. *See Exhibit A*. Further, Mr. Quinlan testified that Lakewood does not do fund raisers very often and that (as of his deposition) the swim club has not done a fund raiser since the Rascal Flatts concert. *See Exhibit B* at 41. Mr. Quinlan's testimony is consistent with his responses on the application for insurance. *See Exhibit E*.

To require Evanston to provide coverage for an injury that arose out of something other than the insured project – the private swim club – would require Evanston to cover a risk that was neither contemplated by the parties nor bargained for. The Circuit Court was correct in preventing that result by granting summary judgment in favor of Evanston.

For these reasons, the Order of December 11, 2007, granting summary judgment in favor of Evanston, was plainly correct and should not be disturbed on Appeal. Thus, the Respondent urges this Court to AFFIRM the December 11, 2007, Order.

- (I) Lakewood's argument that the Evanston policy provides coverage for the claims arising out of plaintiff's slip and fall because the injury occurred within the "coverage territory" is flawed because Endorsement M/E-217 (11/99) modifies the policy.

Lakewood incorrectly argues to this Court that it should look beyond Endorsement M/E-217 (11/99), the "Specified/Designated Premises/Project Limitation" Endorsement, to the language of the Commercial General Liability coverage form which provides that bodily injury must be caused by an "occurrence" that takes place in the "coverage territory" in order to qualify as a covered loss.

“Coverage territory” is subsequently defined by the policy to mean “the United States of America,” “international waters or airspace” (under certain, specified conditions); and “all parts of the world.”

See Exhibit C.

While Evanston does not dispute that the subject policy contains the above-referenced language relative to the “coverage territory,” it hereby asserts that Lakewood places undue reliance upon the “coverage territory” language in its brief. Simply put, it is the language of the “Specified/Designated Premises/Project Limitation” Endorsement (M/E-217 (11/99)) that controls in this case with regard to whether there is coverage under the Evanston policy for the claims arising out of the plaintiff’s slip and fall while at a country music concert at the Charleston Civic Center. Lakewood’s reliance upon the “coverage territory” language is nothing more than a red herring.

As set forth above, pursuant to the “Specified/Designated Premises/Project Limitation” Endorsement (M/E-217 (11/99)), it is a prerequisite to coverage under the Evanston policy that plaintiff’s bodily injury either (1) arose out of the ownership, maintenance or use of the swim club premises or (2) arose out of the project designated in the Endorsement – PRIVATE SWIM CLUB. The Endorsement plainly states that it “changes the policy.” *See Exhibit D.* Therefore, while the policy may have provided coverage for occurrences occurring anywhere within the “coverage territory” absent the “Specified/Designated Premises/Project Limitation” Endorsement (M/E-217 (11/99)), it is undisputed that policy did, in fact, contain the Endorsement, thereby further limiting coverage. As such, to the extent Lakewood’s coverage position and brief are predicated upon the “coverage territory” language, its argument is incorrect and should be disregarded.

- (ii) Lakewood’s argument that the Evanston policy provides coverage for the claims arising out of plaintiff’s slip and fall based on the Additional Insured - Club Members Endorsement, is flawed because Endorsement M/E-217 (11/99) limits coverage to

bodily injury either arising out of the ownership, maintenance or use of the swim club premises or arising out of the project – the private swim club – regardless of whether the claim is asserted against a club member or any other insured.

Similar to its misplaced “coverage territory” argument, Lakewood also incorrectly contends that this Court should give consideration to the “Additional Insured - Club Members Endorsement” to the Evanston policy.

Like the “coverage territory” language, Lakewood’s reliance upon the “Additional Insured - Club Members Endorsement” language is also a red herring. First, Evanston has not taken the position that there is no coverage for the claims arising out of plaintiff’s slip and fall on the basis that the alleged negligence was committed by Lakewood’s members. Furthermore, Lakewood is the named party with respect to the claims asserted by plaintiff and Boston Culinary Group. None of Lakewood’s members have been individually named as defendants and, therefore, the “Additional Insured - Club Members Endorsement” is not implicated.

The “Additional Insured - Club Members Endorsement” merely provides that “WHO IS AN INSURED (Section II) of the Commercial General Liability coverage part is amended to include as an insured any of your members, but only with respect to their liability for your activities or activities they perform on your behalf.” See **Exhibit C**, “Additional Insured - Club Members Endorsement”. The endorsement does not affect or alter the prerequisite to coverage set forth in the “Specified/Designated Premises/Project Limitation” Endorsement. Even in the event claims were asserted against Lakewood’s members, individually, pursuant to “Specified/Designated Premises/Project Limitation” Endorsement, it would remain a prerequisite to coverage under the Evanston policy that plaintiff’s bodily injury either arose out of the ownership, maintenance or use of the swim club premises or that plaintiff’s bodily injury arose out of the project designated in the Endorsement – PRIVATE SWIM CLUB.

For these reasons, to the extent Lakewood's coverage position and its brief are predicated upon the "Additional Insured - Club Members Endorsement", its argument is incorrect and should be disregarded.

2. The Circuit Court was correct in holding that Lakewood had no reasonable expectation that its operation of a beer booth at the Charleston Civic Center was an insured risk, as shown by the policy application.

Prior to the issuance of Evanston policy number CL470100500-01, Lakewood, by and through its agent, Tim Quinlan, was required to complete an application. Along with the standard *ACORD* Commercial Insurance Application, Mr. Quinlan also completed and signed a "Swim & Racquet Club Supplement" to the application. *See* application, including "Swim & Racquet Club Supplement," attached hereto as **Exhibit E**. The supplemental application provided various information about the risk to be insured. Notably, the completed supplemental application, which was signed by Mr. Quinlan, provides that the "Risk is" a "Swim Club." Further, the supplemental application states that no outside events would be sponsored by the swim club and that there would be no special events on or off the premises. *See Exhibit E*. (Emphasis added.)

As the Circuit Court correctly recognized, and as Lakewood has never disputed, Evanston was provided no information whatsoever on the policy application that would even remotely suggest that Lakewood planned to operate a beer booth off-premises, including the subject beer booth at the Charleston Civic Center. Therefore, there is absolutely nothing to suggest that the parties contemplated or bargained for coverage relative to an event such the concession stand operation at issue. Importantly, Lakewood failed to submit any affidavits or other evidence whatsoever in response to Evanston's Motion for Summary Judgment to rebut Evanston's position that, based on the application information provided by its president, Lakewood had no reasonable expectation of coverage for this claim.

The Circuit Court's Order of December 11, 2007, correctly reflects that there is no genuine issue of material fact that would support a finding that Lakewood had a reasonable expectation that its members' operation of a beer booth at the Charleston Civic Center during a country music concert was an insured risk, as evidenced by the policy application. Moreover, the lower court correctly found that it was an unreasonable and untenable assertion by Evanston that the known insuring of an on-premises snack bar by Evanston would expand the insured risk to include the selling of beer by members of the insured at an off-premises beer booth. In fact, the policy even contains a liquor liability exclusion.

Finally, Lakewood has erroneously asserts that language within the policy application is ambiguous and, therefore, coverage must be construed in favor of Lakewood.⁴ In support of its position, counsel for Lakewood relies upon West Virginia case law relative to contractual interpretation of insurance policies where there exists ambiguity in the language of the policy of insurance. Lakewood's position in this regard, specifically the case law it relies upon in support of its position, is clearly incorrect. There is nothing within the case law relied upon by Lakewood to suggest that where the language in a policy application is allegedly ambiguous, the result is that the Court must construe the policy of insurance in favor of the insured. Lakewood has obviously confused these two concepts in an effort to circumvent the clear, plain and unambiguous language of the Evanston policy. Therefore, this Court should disregard Lakewood's argument in its entirety.

⁴ Again, Lakewood has not submitted any affidavit by Tim Quinlan to show that Lakewood misunderstood the language of the application as he was completing that document. Specifically, there is no affidavit by Mr. Quinlan or any other representative or witness on behalf of Lakewood to suggest that when Lakewood responded "no" to the policy application questions regarding whether any outside events were sponsored by the swim club and whether the swim club engaged in any special events on or off the club's premises, that it misunderstood or was confused by those questions.

In granting summary judgment in favor of Evanston, the Circuit Court correctly found that Lakewood had no reasonable expectation that its one-time operation of a beer booth at the Charleston Civic Center during a country music concert was an insured risk, as shown by the policy application. The Order of December 11, 2007, was correct and should not be disturbed on appeal. Thus, Evanston prays that this Honorable Court AFFIRM the Circuit Court's Order.

3. There exists no dispute as to the salient facts of this action for declaratory judgment; rather, the controversy involves only a question of law. Therefore, the Circuit Court was plainly correct in ruling in favor of Evanston's Motion for Summary Judgment, which was predicated upon the language of the policy of insurance at issue.

Rule 56 of the *West Virginia Rules of Civil Procedure* does not require a party to submit affidavits, discovery responses, deposition transcripts, or other evidence in support of its Motion for Summary Judgment. Specifically, the Rule states that "a party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof." *W.Va.R.C.P.* 56(b).

Moreover, as set forth above, the determination of the proper coverage of an insurance contract, when the facts are not in dispute, is a question of law. Syl. Pt. 1, *Tennant v. Smallwood*, 211 W.Va. 703, 568 S.E.2d 10 (2002). The language in an insurance policy should be given its plain, ordinary meaning. Syl. Pt. 1, *Soliva v. Shand, Morahan & Co.*, 176 W.Va. 430, 345 S.E.2d 33 (1986). Where the provisions in an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended. *Keffer v. Prudential Ins. Co.*, 153 W.Va. 813, 172 S.E.2d 714 (1970).

Evanston properly relied upon the clear, plain and unambiguous policy language in bringing its Motion for Summary Judgment. Evanston was not required to submit any affidavits, discovery responses, or deposition testimony in support of its Motion for Summary Judgment. Its Motion for Summary Judgment was both in compliance with Rule 56(b) and was also proper in light of the question of law before the lower court.

Importantly, after Evanston filed its Motion for Summary Judgment, including as an exhibit thereto the policy application, in which Lakewood's agent represented to Evanston that no outside events were sponsored by the swim club and that the swim club did not engage in special events on or off the premises, Lakewood did not offer a response thereto. Lakewood did not submit any affidavits or other evidence of any type to rebut the information contained in the policy application or to advise the lower court that its agent misunderstood or inaccurately responded to the questions contained in the application.

The Order of December 11, 2007, was plainly correct in granting summary judgment in favor of Evanston and therefore, should not be disturbed on appeal. Thus, Evanston prays that this Honorable Court AFFIRM the Order of December 11, 2007.

B. The Circuit Court was correct in finding that Evanston has no duty to defend Lakewood against the claims arising out of plaintiff's slip and fall.

The Circuit Court was correct in finding that Evanston has no duty to defend Lakewood against the claims arising out of plaintiff's slip and fall because the claims do not fall within the coverage provided by the insurance policy. The terms of the policy not only define the scope of coverage, but also govern the existence of Evanston's duty to defend.

The Insuring Agreement of the Evanston policy specifically states that “[Evanston] will have no duty to defend the insured against any ‘suit’ seeking damages for ‘bodily injury’ or ‘property damage’ to which this insurance does not apply.” Moreover, the policy’s “Combination General Endorsement” (MSU 001 (06/04)) also expressly states that “[w]here there is no coverage under this policy, there is no duty to defend.” See **Exhibit C**.

“A liability insurer need not defend a case against the insured if the alleged conduct is entirely foreign to the risk insured against.” *Horace Mann Ins. Co. v. Leeber*, 180 W.Va. 375, 378, 376 S.E.2d 581, 584 (1988). In other words, an insurer has a duty to defend an action against its insured only if the claim stated in the underlying complaint could, without amendment, impose liability for risks the policy covers. If the causes of action alleged in the plaintiff’s complaint are entirely foreign to the risks covered by the insurance policy, then the insurance company is relieved of its duties under the policy. *West Virginia Fire & Cas. Co. v. Stanley*, 216 W.Va. 40, 602 S.E.2d 483 (2004).

For the reasons set forth herein, the claims asserted against Lakewood do not impose liability for risks covered by the Evanston policy. Therefore, in his Order of December 11, 2007, Judge Stucky properly concluded that Evanston has no duty to defend Lakewood. Plaintiff’s alleged bodily injuries did not arise out of the designated project – the private swim club. Further, Lakewood failed to offer any evidence to show that it had a reasonable expectation of coverage for injuries arising out of its operation of a beer booth at the Charleston Civic Center during a Rascal Flatts concert, based upon the undisputed information provided by Lakewood’s agent during the application process.

For these reasons, the Order of December 11, 2007, granting summary judgment in favor of Evanston, was correct and should be **AFFIRMED**.

V. CONCLUSION

The Appellant has failed to raise any novel issues of law or fact that would justify overturning the Circuit Court's well-reasoned Order replete with substantial findings of fact and conclusions of law. As such, Evanston Insurance Company respectfully requests that this Honorable Court AFFIRM the Order of December 11, 2007.

EVANSTON INSURANCE COMPANY,
By Counsel



John F. McCuskey (WV Bar #2431)
Heather B. Osborn (WV Bar #9074)
SHUMAN, MCCUSKEY & SLICER, PLLC
Street: 1411 Virginia Street East, Suite 200 (25301)
Post Office Box 3953
Charleston, West Virginia 25339
(304) 345-1400
(304) 343-1826 (fax)

NON-PROFIT GROUP AGREEMENT

THIS NON-PROFIT GROUP AGREEMENT ("AGREEMENT") is made this 13th day of January, 2004, by and between DISTINCTIVE GOURMET, and SA High
Swim Team, a non-profit, tax-exempt organization, having an address of 2100 Kanawha
Terrace, ST Albans, WV 25177 ("Group").

RECITALS:

- A. Group is a non-profit, tax-exempt group, as defined in Section 501 of the Internal Revenue Code.
- B. DISTINCTIVE GOURMET provides food and beverage services at the public event facility known as Charleston Civic Center, located in 200 Civic Center Dr. Charleston, WV 25301 ("FACILITY")
- C. Group has requested that DISTINCTIVE GOURMET permit Group to engage in fund raising for civic, charitable, religious, or educational purposes through the conduct of concessions operations at the Facility.

DISTINCTIVE GOURMET and Group agree as follows:

1. **Concessions operations.** Group will conduct concessions operations ("Concessions Operations") at the Facility, at such events, in such locations, and selling such products as DISTINCTIVE GOURMET may designate from time to time, and otherwise in accordance with DISTINCTIVE GOURMET instructions. The Concessions Operations shall be conducted in a courteous, efficient and safe manner.
2. **Term.** The term of this Agreement ("Term") shall commence on January, 2004 and shall expire on Dec. 31, 2004, unless sooner terminated in accordance with the terms of this Agreement.
3. **Commissions.**
 - A. In consideration of its conduct of the Concessions Operations, Group shall receive commissions ("Commissions") based on a percentage of the total gross receipts from the Concessions Operations. 10-15% on food and 10% on beer.

EXHIBIT

A

B. Method of Payment. All sums received by Group from the Concessions Operations will be turned over to DISTINCTIVE GOURMET on the same day as received. DISTINCTIVE GOURMET shall calculate the Commissions payable to Group after deducting sales taxes and any cash shortages occurring in the course of the Concessions Operations. Commissions due to Group will be paid every 4 weeks.

6. Products. DISTINCTIVE GOURMET shall supply Group with all products to be sold by Group at the Facility. Group shall be responsible for any loss, damage or theft of products in Group's possession. DISTINCTIVE GOURMET may deduct the total value of any lost, damaged or stolen products from the Commissions otherwise payable to Group. If Group causes an excessive amount of product waste or spoilage during an event as determined by DISTINCTIVE GOURMET, in consideration of the services and products provided to Group by DISTINCTIVE GOURMET, Group will be charged a flat fee of \$25.00 plus the retail value of the wasted or spoiled product. DISTINCTIVE GOURMET may deduct such amounts from the Commissions otherwise payable to Group.
7. Volunteers.

- A. Group shall provide a sufficient number of volunteers, as directed by DISTINCTIVE GOURMET, to serve the Concessions Operations at each event. Such volunteers shall arrive at times designated by DISTINCTIVE GOURMET for each event. No volunteers shall be less than 16 years old, or such other age specified by DISTINCTIVE GOURMET. All volunteers engaged in the Concessions Operations on Group's behalf shall not, under any circumstances, be deemed to be employees of DISTINCTIVE GOURMET, and Group shall so advise each such volunteer in writing in advance. DISTINCTIVE GOURMET requires that prior to each event, each volunteer for such event shall sign and deliver to DISTINCTIVE GOURMET a statement acknowledging that he/she is providing time and effort for the benefit of Group, without intention of receiving wages or benefits. DISTINCTIVE GOURMET shall not be required to pay any wages, or extend any benefits, to such volunteers, and Group agrees to indemnify DISTINCTIVE GOURMET from any and all claims made by its volunteers for any wages or benefits. In addition, Group shall not provide any compensation or benefits to its volunteers of any kind or nature in regard to their services here under, including, without limitation, reimbursing volunteers for their cost and expenses (such as child care or transportation costs).

- B. The Group will provide not less than one leader for each event to be responsible for supervising Group's Volunteers. DISTINCTIVE GOURMET'S manager will communicate directly with such leader with regard to the Concessions Operations. If such leader arrives later than one-half hour after the scheduled check-in time for Group's volunteers, DISTINCTIVE GOURMET shall have the right to cancel Group's operations for the event.
- C. Staffing levels shall be determined by DISTINCTIVE GOURMET in its sole discretion. In the event that Group fails to provide the requisite number of volunteers by the designated time, DISTINCTIVE GOURMET will provide other non-profits to make up the shortage. Group will be charged a % for each such Non-Profit, regardless of actual length of time that such non-profit employee is assigned to work with Group.
- D. All group member handling alcoholic beverages must be a minimum of 21 years of age. Failure to strictly comply with this policy will result in revocation of the group's rights to serve alcoholic beverages and/or suspension/termination owed to the group from previous events.
- E. All group members must behave in a professional manner at all times while on the premises. No alcoholic beverages, drugs, obscene or vulgar language or disruptive behavior will be permitted anywhere on the premises including the parking lot.
- F. Access to premises is permitted only by group members specifically working in the group's assigned locations. The Charleston Civic Center views unauthorized free admission for ticketed events as 'theft of services'. Absolutely no children under the age of 16 are to be in any Charleston Civic Center or Distinctive Gourmet work area. Any persons purchasing tickets and attending shows are not permitted to enter any stands.
- G. Group leaders and group members are required to report 2 hours prior to the start of any event in order to verify inventory, organize product, set up equipment, begin production, review and adjust member staffing levels, review event information with Distinctive Gourmet management and whatever else may be required. Groups reporting times are at the discretion of Distinctive Gourmet Management.
- H. Group's assigned location(s) must be fully prepared for the event and open for business 15 minutes prior to the opening of the facility to the public unless otherwise specified.
- I. All group members must comply with uniform standard as specified. Shirts provided by Distinctive Gourmet. Tan khaki pants, no open toe shoes, high heels, sandals, Capri's or SHORTS.
- J. All food handlers must wear gloves for sanitation purposes. All boxes will be broken down and trash will be removed to the designated location.
- K. It is the group's responsibility to keep all of its members informed with regards to the specific terms and conditions of the agreements. All members must comply with the rules set forth.

8. **Rules and Regulations.** Group shall comply with all rules, regulations, and policies established by DISTINCTIVE GOURMET for the conduct of concession operations at the Facility, as well as all other applicable Federal, State, and local laws and regulations.
9. **Termination.** DISTINCTIVE GOURMET may terminate this Agreement with written notice in the event that Group shall fail to observe or perform any provision of this Agreement, which notice shall be effective immediately. In the event Group's agreement is terminated by DISTINCTIVE GOURMET, Group's members may not, at DISTINCTIVE GOURMET'S discretion, be allowed to conduct Concession Operations at the location for any other Group, or under any other Group name. DISTINCTIVE GOURMET may terminate this Agreement immediately in the event any Group member violates any rules and regulations established by DISTINCTIVE GOURMET for conduct of service of alcoholic beverages to the public at the facility, as well as other applicable Federal, State, and local laws and regulations.
10. **Insurance.** Group shall provide to DISTINCTIVE GOURMET before entering the Facility, a certificate of insurance evidencing insurance coverage reasonably acceptable to DISTINCTIVE GOURMET. Group must also extend their General Liability policy to include Liquor Liability where alcoholic beverages (including beer, wine, and spirits) are served by the Group. All policies shall name DISTINCTIVE GOURMET as an additional insured party Or by signing a waiver form at each event for each worker.
11. **Indemnification.** Group shall indemnify and hold DISTINCTIVE GOURMET harmless from any and all claims, litigation, damages, losses, expenses (including attorneys' fees) arising by reason of Group's activities at the Facility, and for injury or damage to any persons or property by reason of any of the foregoing.
12. **Cancellation.** DISTINCTIVE GOURMET shall have the right to cancel Group's Concessions Operations for a particular event or events. DISTINCTIVE GOURMET will use reasonable efforts to provide 48 hours' prior notice of such cancellation. Group shall give not less than 48 hours' Prior notice if Group intends to cancel an event at which it is scheduled to conduct Concessions Operations. If a group fails to give at least 48 hours prior notice of cancellation, a penalty of \$100.00 per stand reserved will be deducted from Group's previous or next event's Commissions.
13. **Training.** Any Group that has not previously conducted Concessions Operations at the Facility shall cause its volunteers to undergo a training program consisting of, at DISTINCTIVE GOURMET'S option, from 1 to 5 actual events and/or orientation sessions. DISTINCTIVE GOURMET may require that volunteers undergo a retraining program consisting of from 1 to 3 actual events.
14. **Cleaning.** Group will be charged \$50.00 per occurrence for cleaning, if a concession area assigned to Group is not left in a satisfactory condition.

12/21/2005 11:15

3043421304

DISTINCTIVE GOURMET

PAGE 06

SEP-17-2004 08:30

FROM-BIBLE C R CHURCH

3043460433

T-667 P.005/000 F-020

DISTINCTIVE GOURMET may deduct such amounts from commissions otherwise payable to Group.

15. **Set-up.** Group will be charged \$50.00 per occurrence for setting up the Concessions operation by DISTINCTIVE GOURMET'S employees in the event the group is late for check-in.
16. **Damage.** Group shall be responsible for any damage to its concession areas caused by its volunteers. DISTINCTIVE GOURMET may deduct such amounts from the Commissions otherwise payable to Group.
17. **Tax Exempt Status.** Group represents and warrants to DISTINCTIVE GOURMET that it is, and shall remain throughout the Term, a non-profit, tax-exempt entity as defined in Section 501 of the Internal Revenue Code.

IN WITNESS WHEREOF, the parties have caused this agreement to be signed by their duly authorized representatives the day and year first set forth above.

DISTINCTIVE GOURMET

By: Distinctive Gourmet

Name: Lisa Dravenstott

Title: Operations Manager

SA High Swim Team
("Group")

12/21/2005 11:15
SEP-17-2004 08:38

3843421384
FROM-BIBLE C R CHURCH

DISTINCTIVE GOURMET

PAGE 07

3043480433

T-667 P.006/000 F-920

By: SA High School

Name: Jacqueline A Berry

Title: Swim Team Parent Rep.

Exhibit C Distinctive Gourmet Non Profit/Service Group Agreement Paragraph 13:

- A. The group is an independent contractor. Neither the group nor its individual members are considered Distinctive Gourmet employees.
- B. The group will indemnify and hold harmless Distinctive Gourmet Corporation and its owners, officers, employees, and agents from bodily injury or property damage claims as a result of performing any activity under this agreement. It is the group's responsibility to ensure that each group member who will work in the agreed upon service area will sign a waiver before beginning work, releasing the above person or entities of these responsibilities. It is the specific responsibility of each group to ensure that no member works in its area who had not signed this waiver.

In signing below the members of St. Albans Swim Team (Group) affirm that they have read, understood, and accept the terms of the above provisions of the Agreement.

Print Name	Signature	Date
David Pyle	<i>David Pyle</i>	10-13-05
Julie Perry	<i>Julie Perry</i>	10-19-05
Pam Bosley	<i>Pam Bosley</i>	10-18-05
Urena Borel	<i>Urena Borel</i>	10-18-05
Gina Bowen	<i>Gina Bowen</i>	10-18-05
Ken Robinson	<i>Ken Robinson</i>	10-18-05
Dana Robinson	<i>Dana Robinson</i>	10-18-05
Keth Bowen	<i>Keth Bowen</i>	10-14-05
Jess Goss	<i>Jess Goss</i>	10/14/05
Jim Quinn	<i>Jim Quinn</i>	10/14/05
Kim Goss	<i>Kim Goss</i>	10/14/05
Wendy Kish	<i>Wendy Kish</i>	10/14/05
Dana Robinson	<i>Dana Robinson</i>	10/14/05
Sandra Elkins	<i>Sandra Elkins</i>	10-14-05

*Attach additional sheet(s) if necessary. Must list all names. Update as new members are used. Both Group and Distinctive Gourmet to maintain copies.

St. Albans Swim Team Coordinator contact is
 Jacquie Berry
 346-0222 H
 542-5111 W



COPY

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

MICHAEL BLANKENSHIP and
MISTY BLANKENSHIP,

Plaintiffs,

v.

Civil Action No.: 06-C-2062

THE CITY OF CHARLESTON and
BOSTON CULINARY GROUP, INC.,
d/b/a DISTINCTIVE GOURMET,

Defendants.

The deposition of M. Timothy Quinlan, Jr. was taken pursuant to notice in the above-entitled action on the 20th day of June, commencing at 3:05 p.m. and concluding at 4:13 p.m., at City National Bank, 560 Fourth Street, Saint Albans, Kanawha County, West Virginia, before Kristi D. Johnson, Certified Court Reporter and Notary Public, pursuant to the West Virginia Rules of Civil Procedure.

*Kristi D. Johnson, CCR
Connie Doughty DeMuth & Associates
Certified Court Reporters
Post Office Box 701
Dunbar, West Virginia 25064
304-766-8708*

EXHIBIT

B

PAGE 2

APPEARANCES

On behalf of the Plaintiffs:

BRUCE L. FREEMAN, ESQUIRE
Freeman & Chiartas
1554 Kanawha Boulevard
Post Office Box 347
Charleston, West Virginia 25311

On behalf of the Defendants:

NATALIE C. SCHAEFER, ESQUIRE
Steptoe & Johnson, PLLC
707 Virginia Street, East
Post Office Box 1588
Charleston, West Virginia 25326

MICHAEL P. MARKINS, ESQUIRE
John R. Fowler, PLLC
500 Virginia Street, East
Suite 1190
Charleston, West Virginia 25301

Also Present:

AMY R. HUMPHREYS, ESQUIRE
Flaherty, Sensabaugh & Bonasso, PLLC
200 Capitol Street
Post Office Box 3843
Charleston, West Virginia 25338

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INDEX

Witness	Examination	Re-examination
Timothy Quinlan, Jr.	4 (Freeman) 31 (Markins) 43 (Schaefer)	61 (Freeman) 63 (Markins)
Exhibits	Identified	
Joint Exhibit No. 1 (Witness Statements)	5	
Joint Exhibit No. 2 (Beer Stand Photo)	21	
Joint Exhibit No. 3 (Beer Stand Photo)	21	
Joint Exhibit No. 4 (Beer Stand Photo)	21	
Joint Exhibit No. 5 (Beer Stand Photo)	21	
Joint Exhibit No. 6 (Beer Stand Photo)	21	
Joint Exhibit No. 7 (Service Agreement)	33	
Joint Exhibit No. 8 (Non-Profit Agreement)	34	

Reporter's Certificate

Pages 65-66

June 20, 2007

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1 June 20, 2007

2 (Witness sworn)

3 THEREUPON

4 M. TIMOTHY QUINLAN, Jr.

5 was called as a witness and, after being first duly
6 sworn, was examined and testified as follows:

7 EXAMINATION

8 BY MR. FREEMAN:

9 Q Go ahead and give us your full name and
10 address --

11 A Okay.

12 Q -- and where you work.

13 A It's Michael Timothy Quinlan, Jr., but I go by
14 Tim; 209 Parkview Drive in Saint Albans, 25177, and I
15 work at City National Bank as a senior vice president of
16 retail banking.

17 Q Tim, have you had any opportunity to review
18 anything to get ready for today?

19 A Just my past statement.

20 Q Do you have that with you?

21 A No, I do not.

22 Q Let me just hand you what I think is your past
23 statement and ask if this is it.

24 A Correct.

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1 Q That's it?

2 A That's it.

3 MR. FREEMAN: Since that sheet, which is
4 one page, consists of everyone's statement, let's just
5 make it Joint Exhibit No. 1 to the depositions today.

6 (WHEREUPON, the document referred to
7 was duly marked for identification
8 as Joint Exhibit No. 1 and attached
9 hereto.)

10 BY MR. FREEMAN:

11 Q Is that the only statement you've given about
12 this occurrence?

13 A Yes.

14 Q Either written, oral or taped?

15 A That is the only statement.

16 Q You don't know any of the parties in this case
17 do you?

18 A The Blankenships?

19 Q The Blankenships, right.

20 A No, I do not.

21 Q Do you have any common friends or
22 acquaintances?

23 A Not that I'm aware of.

24 Q You were there at the Civic Center because of

June 20, 2007

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1 Q And your signature is affixed to that
2 document; is that correct?

3 A Yes.

4 Q Did you read that document prior to signing
5 it?

6 A I don't recall. This is the document that we
7 signed when we received our shirts.

8 Q And you don't recall whether or not you read
9 it?

10 A I don't recall.

11 Q I'm assuming as a vice president of a bank
12 that you know it's probably a good idea to read
13 something before you sign it; is that correct?

14 A Oh, absolutely.

15 Q Is that your general practice to read
16 something before you sign it?

17 A It is.

18 MR. MARKINS: Let's mark this as Exhibit
19 No. 8.

20 (WHEREUPON, the document referred to
21 was duly marked for identification
22 as Joint Exhibit No. 8 and attached
23 hereto.)

24 BY MR. MARKINS:

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1 Q Let me show you what's been marked as Exhibit
2 No. 8.

3 A Uh-huh.

4 MR. FREEMAN: I missed that. What was
5 it?

6 MR. MARKINS: It's the agreement between
7 Boston Culinary and the --

8 BY MR. MARKINS:

9 Q Have you seen that document there before?

10 A No, I have not.

11 Q Now that document's signed by Jackie Berry; do
12 you know Jackie Berry?

13 A Yes, I do.

14 Q And who is Jackie Berry?

15 A Jackie is a member of our pool.

16 Q So she's a member of Lakewood Swim Club as
17 well?

18 A Yeah.

19 Q Does she hold any position within the pool?

20 A She's the pool manager.

21 Q Now Exhibit Nos. 7 and 8 say that Jackie was
22 there for -- or you guys were there for the Saint Albans
23 Swim Team. That's not entirely accurate, is it?

24 A We were there representing the pool, working a

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1 booth, because the Saint Albans Swim Team couldn't work
2 an alcohol booth because they were all underage. But
3 that was plainly known by Boston Culinary Group.

4 Q But you guys were representatives of Lakewood
5 Swim Club?

6 A That's correct.

7 Q After the fall, were you able to talk to Mr.
8 Blankenship at all?

9 A No.

10 Q Did you notice any of his mannerisms? You say
11 he screamed out in pain; did you notice anything else?

12 A Only that he was obviously in pain.

13 Q And I understand you're not an expert or
14 anything like that, so I'll go ahead and let the
15 objection be made after I ask this question, so wait a
16 second after I ask it.

17 MR. FREEMAN: Now we've got to do
18 something.

19 BY MR. MARKINS:

20 Q Did Mr. Blankenship appear to be intoxicated
21 to you?

22 MR. FREEMAN: You know, I'm sure from
23 his experience of being intoxicated, he'll recognize
24 what intoxicated looks like.

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1 MS. HUMPHREYS: Now, I'm going to have to
2 object to the foundation of that objection. I'm going
3 to object.

4 THE WITNESS: I don't feel I'm in a
5 position to make a judgement on that. I would assume
6 the police officers would be much better to make a
7 statement. They were there very shortly thereafter and
8 have a lot more dealings with that than I certainly do.

9 BY MR. MARKINS:

10 Q Do you recall the names of the police officers
11 who showed up?

12 A We were uninvolved from the moment they
13 arrived. Our involvement ended by contacting Boston
14 Culinary Group to let them know what occurred.

15 Q Do you recall who you contacted at Boston
16 Culinary Group?

17 A I do not. I did not make the contact. One of
18 our group members went for -- and I don't even know who
19 did it -- went and sought out help and then a blonde-
20 haired lady, and I don't even recall her name, from
21 Boston Culinary Group arrived. She took charge as to
22 what was going on. It might have been Lisa but that's
23 purely, it would be speculative. She was the lady that
24 was downstairs and that we always settled with in the

June 20, 2007

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1 end.
2 Q And you don't know if a police report or
3 anything like that was filled out?
4 A Personal knowledge, no, I don't know that.
5 Q You weren't contacted by anybody from either
6 the City Police or anything to give a statement?
7 A Absolutely not.
8 Q What's Keith Bowens' relationship with the
9 Lakewood Swim Club?
10 A Pool member.
11 Q Does he hold any other titles,
12 responsibilities?
13 A No.
14 Q What about Sandra Elkins?
15 A She's a pool member. She also works for the
16 pool as assistant manager.
17 Q What about Charlie Parson?
18 A I don't know Charlie personally but I'm
19 assuming he is a pool member. Actually, I know a Curtis
20 Parsons. I don't know if he goes by Charlie or not.
21 Q If it is the same person, what's his
22 relationship with the pool?
23 A Pool member.
24 Q Just pool member?

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1 A Curtis Parsons is a pool member.
2 MR. FREEMAN: Is that who's going to be
3 here today, Curtis Parsons?
4 THE WITNESS: Yes.
5 MR. FREEMAN: We're just going to hope
6 that he's Charlie.
7 THE WITNESS: I have no idea.
8 BY MR. MARKINS:
9 Q What about David Poe?
10 A Pool member.
11 Q And Julie Berry?
12 A David Poe's also a board member.
13 Q He is a board member?
14 A Uh-huh.
15 Q What's his title, just board member?
16 A Board member.
17 Q What about Julie Perry?
18 A Pool member.
19 Q And Pam Bosley?
20 A Pool member.
21 Q Any other title?
22 A (Witness nods negatively).
23 MS. HUMPHREYS: No, for the record.
24 THE WITNESS: Oh, I'm sorry. No.

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1 Sorry. She can't see me shaking my head there.
2 BY MR. MARKINS:
3 Q Michael Ridge?
4 A Mike is a pool member and is also vice
5 president of the board.
6 Q Gina Bowen?
7 A Pool member.
8 Q Ken Roberson?
9 A Pool member and he is also a member of the
10 board.
11 Q And Donna Roberson?
12 A Pool member.
13 Q Is that Jeff Goode?
14 A Yes. Pool member and he is president of the
15 pool.
16 Q And Jim Baylor?
17 A Beheler.
18 Q Beheler?
19 A Jim is a board member and a pool member.
20 Q And Kim Goode?
21 A Pool member.
22 Q Is that Keith Asbury?
23 A Yes. He is a pool member and a board member.
24 Q And Donna Roberson?

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1 A She's a pool member.
2 Q Now the swim club, you mentioned this isn't
3 the first time that they've done these sort of fund
4 raisers?
5 A Uh-huh.
6 Q Do you guys have, if you know, a filing system
7 where these types of contracts are kept?
8 A We don't have any of those types of contracts.
9 Q You don't keep copies of the contracts?
10 A I've never seen that before until you showed
11 it to me.
12 Q Do you know what records that the swim club
13 does keep?
14 A In what regard?
15 Q In regard to fund raisers.
16 A We don't do fund raisers very often with the
17 exception of this. We haven't done any since then.
18 Q And you don't keep records of who worked them
19 or anything like that?
20 A No, we don't.
21 Q Going out on a limb here, but I assume the
22 Lakewood Swim Club banks with City National Bank?
23 A Yes, we do.
24 Q And any money that was earned from this fund

June 20, 2007

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1 A I did not observe any stumbling or anything
2 along those lines. When he fell he was in pain. That's
3 the only thing that was clear after that.
4 Q Was he in pain after the first fall or the
5 second fall?
6 A I do not know the answer to that. I know he
7 tried to get back up immediately after the first fall.
8 I don't remember him crying out in pain until after the
9 second fall.
10 Q What is the relationship between -- and I
11 apologize if somebody asked you this earlier -- between
12 the Lakewood Swim Club and the Saint Albans Swim Team?
13 A The only real -- the Saint Albans Swim Team is
14 a completely different organization. The only
15 relationship would be that Jackie Berry, who is our pool
16 manager, saw an opportunity for the pool to make some
17 extra money in working a beer booth because Boston
18 Culinary Group apparently was, I'm assuming, they had
19 tough times finding people to do this, and so she
20 contacted us to see if we had an interest in doing it as
21 a fund raiser.
22 Q And she's associated with both just through
23 the pool?
24 A I think her son is on the swim team in Saint

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1 Albans.
2 Q Do you know the names of the individuals that
3 worked this booth that night? I know you said around 10
4 or 12. Give me some names if you can recall.
5 A I think they're here on Exhibit No. 7.
6 Q They're all -- all of those people were there
7 that night?
8 A Yes.
9 Q At this booth?
10 A Yes.
11 Q Did you talk to any -- I know you said that
12 the swim club walked away after the police became
13 involved. Did you speak with anybody from the EMS
14 ambulance?
15 A No.
16 Q Did Mr. Blankenship when he cried out in pain
17 specifically describe what pain he was having?
18 A I don't recall.
19 Q Do you know if there were any other Boston
20 Culinary booths at this concert that night?
21 A Yes.
22 Q There were?
23 A Yes.
24 Q Do you know what they were?

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1 A The only thing I can say specifically is it
2 seems like by my one other previous time working there
3 that there was a Bud Light booth and another beer brand
4 booth that was in operation. I don't remember which one
5 it was.
6 Q Now all of the cups that were sold that night
7 had lids; correct?
8 A I couldn't answer that.
9 Q They were supposed to, how about that?
10 A They were supposed to have lids, yes.
11 Q Do you recall what the plaintiff was wearing
12 that day, shoes?
13 A Recall what?
14 Q What shoes Mr. Blankenship was wearing that
15 day?
16 A No.
17 Q Do you recall where the booth was in the Civic
18 Center, what section?
19 A No.
20 Q Do you know if Mr. Blankenship had anything
21 else in his hands other than those two beers that he
22 dropped?
23 A I did not see anything else.
24 Q And how's the lighting at the booth around

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1 this time?
2 A The lighting?
3 Q Uh-huh. How would you describe the lighting?
4 A Very similar to what you would see in the
5 picture there.
6 Q You could see; correct?
7 A Yes.
8 MS. SCHAEFER: All right. That's all I
9 have.
10 R E - E X A M I N A T I O N
11 BY MR. FREEMAN:
12 Q The ID person, did you ever say whether that
13 was a man or a woman?
14 A It was a man.
15 Q I don't think we ever asked you, but the beer
16 is dispensed from a keg, isn't it?
17 A Correct.
18 Q Now where are the kegs kept in relation to
19 this photo, Exhibit No. 2?
20 A You can see them where the coolers are.
21 Q Back there where the orange cooler is?
22 A Yes.
23 Q How many kegs --
24 You can actually see it in a different



EVANSTON INSURANCE COMPANY

COMMON POLICY DECLARATIONS

Previous Policy No.: CL470100500-01

Policy No.: CP470100909

POLICY PERIOD: From 05/10/2005 To 05/10/2006 Term: 1 YEAR
at 12:01 A.M. Standard Time at your mailing address shown below.

LAKEWOOD SWIM CLUB

Named Insured:

Mailing Address: 2088 LAKEWOOD DR
ST ALBANS WV 25177
Street Number City State Zip Code

BUSINESS DESCRIPTION: PRIVATE SWIM CLUB

IN RETURN FOR THE PAYMENT OF THE PREMIUM, AND SUBJECT TO ALL THE TERMS OF THIS POLICY, WE AGREE WITH YOU TO PROVIDE THE INSURANCE AS STATED IN THIS POLICY.

THIS POLICY CONSISTS OF THE FOLLOWING COVERAGE PARTS FOR WHICH A PREMIUM IS INDICATED. THIS PREMIUM MAY BE SUBJECT TO ADJUSTMENT.

	PREMIUM
Commercial Crime Coverage Part.....	\$
Commercial General Liability Coverage Part.....	\$ 3,623.00
Commercial Inland Marine Coverage Part.....	\$
Commercial Ocean Marine Coverage Part.....	\$
Commercial Professional Liability Coverage Part.....	\$
Commercial Property Coverage Part.....	\$ 1,395.00
Other Charges <u>WV SL</u>	\$
Other Charges <u>WV SC</u>	\$
Other Charges <u>POLICY FEE</u>	\$ 50.18
Other Charges.....	\$ 175.00
Other Charges.....	\$
Other Charges.....	\$
Premium Total	\$ 5,018.00
Audit Period: Annual unless otherwise stated	
TOTAL	\$ 5,450.90

FORMS AND ENDORSEMENTS: MSU-100(05-00), 011-1095(07-01), 011-1096(01-02), 011-1061(08-02), 011-1051(05-98)

Inspection Ordered: ☐ Yes ☐ No ☐ Not Required Date: _____
Photograph Ordered ☐ Yes ☐ No ☐ Not Required

U/W NAME: _____

Protection Class: _____

Agency Name/ Address: HUNTINGTON WV
Agency Number: CITY INS #4386

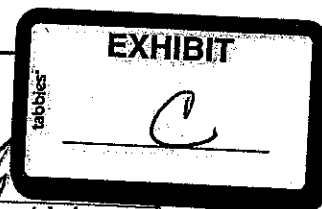
Countersigned: 05/24/2005 TP By Kerry Dillard
Date

011-1058 (11/99)

COMPANY

AUTHORIZED REPRESENTATIVE

B. C. Williams
/s/ We hereby certify this to
be a true copy of the original.





EVANSTON INSURANCE COMPANY

COMMERCIAL GENERAL LIABILITY COVERAGE PART SUPPLEMENTAL DECLARATIONS

These Supplemental Declarations form a part of policy number CP470100909

LIMITS OF INSURANCE

General Aggregate Limit (other than Products/ Completed Operations)	\$ 1,000,000
Products/ Completed Operations Aggregate Limit	\$ EXCLUDED
Personal and Advertising Injury Limit	\$ 1,000,000
Each Occurrence Limit	\$ 1,000,000
Damage to Rented Premises	\$ 50,000 Each Occurrence
Medical Expense Limit	\$ 1,000 Any One Person

BUSINESS DESCRIPTION AND LOCATION OF PREMISES COVERED BY THIS POLICY

Form of business:

☐ Individual ☐ Joint Venture ☐ Partnership ☒ Organization (other than Partnership or Joint Venture)

Location of all premises you own, rent or occupy: LAKEWOOD RD., ST ALBANS WV 25177

PREMIUM

Description of Hazards/ Insured Classification(s)	Code No.	*Premium Basis	PR/ Co	Rate		Advance Premium	
				All	Other	Pr/ Co	All Other
SWIM CLUB	41666	150) MEMBERS	EXCL	24		\$ EXCL	\$ 3,600.00
SNACK BAR	16821	5,000) SALES	EXCL	4.5		EXCL	23.00

*(a) Area, (c) Total Cost, (m) Admission, (p) Payroll, (s) Gross Sales, (u) Units, (o) Other

TOTAL
ADVANCE
PREMIUM \$ 3,623.00

FORMS AND ENDORSEMENTS (other than applicable forms and endorsements shown elsewhere in the policy)

Forms and endorsements applying to this Coverage Part and made part of this policy at time of issue:

CG 00 01 (07-98), CG 00 57 (09-99), CG 21 68 (01-02), ME-011(04-99), ME-024(09-00), ME-048(04-99), ME-064(04-99),
ME-155(04-99), ME-173(04-99), ME-189(09-00), ME-217(11-99), ME-221(04-99), ME-235(08-02), ME-247(04-99), MSU-001(06-04),
PREEX(05-03)

THIS SUPPLEMENTAL DECLARATIONS AND THE COMMERCIAL LIABILITY DECLARATIONS, TOGETHER WITH THE COMMON POLICY CONDITIONS, COVERAGE FORM(S) AND ENDORSEMENTS COMPLETE THE ABOVE NUMBERED POLICY.

COMPANY

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section II - Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section V - Definitions.

SECTION I - COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in Section III - Limits Of Insurance; and
- (2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverage A and B.

- b. This insurance applies to "bodily injury" and "property damage" only if:

- (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and
- (2) The "bodily injury" or "property damage" occurs during the policy period.

- c. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of rea-

sonable force to protect persons or property.

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:
 - (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
 - (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

c. Liquor Liability

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

- (1) Causing or contributing to the intoxication of any person;
- (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
- (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.

d. Workers' Compensation And Similar Laws

- (1) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and
- (2) The total of all deductible and self-insured amounts under all that other insurance.

We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

c. Method Of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

5. Premium Audit

- a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.
- b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period. Audit premiums are due and payable on notice to the first Named Insured. If the sum of the advance and audit premiums paid for the policy period is greater than the earned premium, we will return the excess to the first Named Insured.
- c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.

6. Representations

By accepting this policy, you agree:

- a. The statements in the Declarations are accurate and complete;
- b. Those statements are based upon representations you made to us; and
- c. We have issued this policy in reliance upon your representations.

7. Separation Of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

- a. As if each Named Insured were the only Named Insured; and

- b. Separately to each insured against whom claim is made or "suit" is brought.

8. Transfer Of Rights Of Recovery Against Others To Us

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

9. When We Do Not Renew

If we decide not to renew this Coverage Part, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than 30 days before the expiration date.

If notice is mailed, proof of mailing will be sufficient proof of notice.

SECTION V - DEFINITIONS

1. "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters.
2. "Auto" means a land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment. But "auto" does not include "mobile equipment".
3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
4. "Coverage territory" means:
 - a. The United States of America (including its territories and possessions), Puerto Rico and Canada;
 - b. International waters or airspace, provided the injury or damage does not occur in the course of travel or transportation to or from any place not included in a. above; or
 - c. All parts of the world if:
 - (1) The injury or damage arises out of:
 - (a) Goods or products made or sold by you in the territory described in a. above; or
 - (b) The activities of a person whose home is in the territory described in a. above, but is away for a short time on your business; and
 - (2) The insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in a. above or in a settlement we agree to.
5. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".
6. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document.



EVANSTON INSURANCE COMPANY

ADDITIONAL INSURED - CLUB MEMBERS ENDORSEMENT

* Entry optional if shown in the Common Policy Declarations. If no entry is shown, the effective date of the endorsement is the same as the effective date of the policy.

*ATTACHED TO AND FORMING PART OF POLICY NO. CP470100909	*EFFECTIVE DATE OF ENDORSEMENT 05/10/2005	*ISSUED TO LAKEWOOD SWIM CLUB
---	---	----------------------------------

THIS ENDORSEMENT CHANGES THE POLICY.

WHO IS AN INSURED (Section II) of the Commercial General Liability coverage part is amended to include as an insured any of your members, but only with respect to their liability for your activities or activities they perform on your behalf.

AUTHORIZED REPRESENTATIVE

DATE

M/E-011 (4/99)

COMPANY



EVANSTON INSURANCE COMPANY

SPECIFIED / DESIGNATED PREMISES/ PROJECT LIMITATION

** Entry optional if shown in the Common Policy Declarations. If no entry is shown, the effective date of the endorsement is the same as the effective date of the policy.*

*ATTACHED TO AND FORMING PART OF POLICY NO.	*EFFECTIVE DATE OF ENDORSEMENT	*ISSUED TO
CP470100909	05/10/2005	LAKEWOOD SWIM CLUB

THIS ENDORSEMENT CHANGES THE POLICY.

Schedule

Premises:

LAKEWOOD DR.
ST ALBANS WV 25177

Project:

PRIVATE SWIM CLUB

(Complete above if information different than that shown in the Declarations)

This insurance applies only to "bodily injury", "property damage", "personal injury", "advertising injury" and medical expenses arising out of:

1. The ownership, maintenance or use of the premises shown in the Schedule (or Declarations);
or
2. The project shown in the Schedule (or Declarations).

AUTHORIZED REPRESENTATIVE DATE



EVANSTON INSURANCE COMPANY

11. Professional liability, malpractice, errors, omissions, acts of any type including rendering or failure to render any type of professional service are not covered under this policy nor are any expenses nor are any obligations to share damages with or repay anyone else who must pay damages from same, unless such coverage is specifically endorsed onto this policy.
12. The coverage under this policy does not apply to "bodily injury," "property damage," "personal and advertising injury," or any injury, loss, or damage arising out of actions, allegations, expense initiated or caused to be brought about by any insured covered by this policy against any other insured covered by this policy.
13. Supplementary Payments - Coverages A and B - of the Commercial General Liability Coverage Form is amended and applies throughout this policy as follows:
 - (A) Paragraph 1.e. is deleted and replaced as follows:
 - (e) All costs awarded against an insured in the suit. For the purpose of this subparagraph, "costs" does not include attorney fees awarded to the judgment creditor as the prevailing party pertinent to any contract or statute unless the compensatory damages for that same liability on which the fee award is based are of a type insured by this policy.
 - (B) The last paragraph of 1. is deleted and replaced as follows:

Except with respect to attorney fees in subparagraph (e), these payments will not reduce the limits of insurance.
14. Where there is no coverage under this policy, there is no duty to defend.



EVANSTON INSURANCE COMPANY

SPECIFIED / DESIGNATED PREMISES/ PROJECT LIMITATION

** Entry optional if shown in the Common Policy Declarations. If no entry is shown, the effective date of the endorsement is the same as the effective date of the policy.*

*ATTACHED TO AND FORMING PART OF POLICY NO.	*EFFECTIVE DATE OF ENDORSEMENT	*ISSUED TO
CP470100909	05/10/2005	LAKEWOOD SWIM CLUB

THIS ENDORSEMENT CHANGES THE POLICY.

Schedule

Premises:

LAKEWOOD DR.
ST ALBANS WV 25177

Project:

PRIVATE SWIM CLUB

(Complete above if information different than that shown in the Declarations)

This insurance applies only to "bodily injury", "property damage", "personal injury", "advertising injury" and medical expenses arising out of:

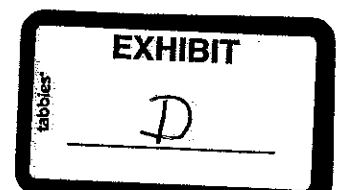
1. The ownership, maintenance or use of the premises shown in the Schedule (or Declarations);
or
2. The project shown in the Schedule (or Declarations).

AUTHORIZED REPRESENTATIVE

DATE

M/E-217 (11/99)

COMPANY



ACORD COMMERCIAL INSURANCE APPLICATION

APPLICANT INFORMATION SECTION

DATE

04/25/2005

PRODUCER PHONE (304)926-7400
FAX (304)926-7429

CityInsurance Professionals
3601 MacCorkle Ave. SE
P O Box 1126
Charleston, WV 25324

CODE SUB CODE
AGENCY CUSTOMER ID
00009999

CARRIER Evanston
NAIC CODE
POLICIES OR PROGRAM REQUESTED

UNDERWRITER

M. COOK

JUN 29 2005

INDICATE SECTIONS ATTACHED

PROPERTY
GLASS AND SIGN
ACCOUNTS RECEIVABLE/
VALUABLE PAPERS
CRIME/MISCELLANEOUS CRIME
TRANSPORTATION/
MOTOR TRUCK CARGO

EQUIPMENT FLOATER
INSTALLATION/BUILDERS RISK
ELECTRONIC DATA PROC
COMMERCIAL
GENERAL LIABILITY
BUSINESS AUTO
TRUCKERS/MOTOR CARRIER

GARAGE AND DEALERS
VEHICLE SCHEDULE
BOILER & MACHINERY
WORKERS COMPENSATION
UMBRELLA

STATUS OF SUBMISSION

PACKAGE POLICY INFORMATION

QUOTE ISSUE POLICY

BOUND (Give Date and/or Attach Copy)

DATE TIME AM PM

ENTER THIS INFORMATION WHEN COMMON DATES AND TERMS APPLY TO SEVERAL LINES, OR FOR MONOLINE POLICIES

PROPOSED EFF DATE 05/10/2005 PROPOSED EXP DATE 05/10/2006 BILLING PLAN PAYMENT PLAN AUDIT
DIRECT BILL
X AGENCY BILL

APPLICANT INFORMATION

NAME (First Named Insured & Other Named Insureds)

FEIN OR SOC SEC #
(of First Named Insured)
PHONE
(A/C, No, Ext)

MAILING ADDRESS INCL ZIP+4 (of First Named Insured) Kanawha
2077 Shadyside Road 2088 LAKEWOOD DRIVE
St. Albans, WV 25177

INDIVIDUAL CORPORATION SUBCHAPTER "S" CORPORATION LIMITED CORPORATION
PARTNERSHIP JOINT VENTURE
INSPECTION CONTACT PHONE (A/C, No, Ext)

YEAR BUS STARTED

ACCOUNTING RECORDS CONTACT PHONE (A/C, No, Ext)

PREMISES INFORMATION

LOC #	BLO #	STREET, CITY, COUNTY, STATE, ZIP+4	CITY LIMITS	INTEREST	YR BUILT	PART OCCUPIED
00001	00001	Lakewood Road St. Albans Kanawha WV 25177	X INSIDE OUTSIDE	OWNER TENANT	100	
00001	00002	Lakewood Road St. Albans Kanawha WV 25177	X INSIDE OUTSIDE	OWNER TENANT	100	
			INSIDE OUTSIDE	OWNER TENANT		

NATURE OF BUSINESS/DESCRIPTION OF OPERATIONS BY PREMISE(S)

Swim Club - Private

RECEIVED
BLOSS & DILLARD INC
MAY 11 2005

GENERAL INFORMATION

EXPLAIN ALL "YES" RESPONSES

- IS THE APPLICANT A SUBSIDIARY OF ANOTHER ENTITY OR DOES THE APPLICANT HAVE ANY SUBSIDIARIES?
- IS A FORMAL SAFETY PROGRAM IN OPERATION?
- ANY EXPOSURE TO FLAMMABLES, EXPLOSIVES, CHEMICALS?
- ANY CATASTROPHE EXPOSURE?
- ANY OTHER INSURANCE WITH THIS COMPANY OR BEING SUBMITTED?
- ANY POLICY OR COVERAGE DECLINED, CANCELLED OR NON RENEWED DURING THE PRIOR 5 YEARS? (NOT APPLICABLE IN MO)

EXPLAIN ALL "YES" RESPONSES

- ANY PAST LOSSES OR CLAIMS RELATING TO SEXUAL ABUSE OR MOLESTATION ALLEGATIONS, DISCRIMINATION OR NEGLIGENCE/HIRING?
- DURING THE LAST TEN YEARS, HAS ANY APPLICANT BEEN CONVICTED OF ANY DEGREE OF THE CRIME OF ARSON? (On FL, this question must be answered by any applicant for property insurance. Failure to disclose the existence of an arson conviction is a misdemeanor punishable by a sentence of up to one year of imprisonment)
- ANY UNCORRECTED FIRE CODE VIOLATIONS?
- ANY BANKRUPTCIES, TAX OR CREDIT LIENS AGAINST THE APPLICANT IN THE PAST 5 YEARS?

REMARKS

Red Cross trains and certifies life guards every year

ANY PERSON WHO KNOWINGLY AND WITH INTENT TO DEFRAUD ANY INSURANCE COMPANY OR ANOTHER PERSON FILES AN APPLICATION FOR INSURANCE OR STATEMENT OF CLAIM CONTAINING ANY MATERIALLY FALSE INFORMATION, OR CONCEALS FOR THE PURPOSE OF MISLEADING, INFORMATION CONCERNING ANY FACT MATERIAL THERETO, COMMITS A FRAUDULENT INSURANCE ACT, WHICH IS A CRIME AND SUBJECTS THE PERSON TO CRIMINAL AND CIVIL SUBSTANTIAL CIVIL PENALTIES. (NOT APPLICABLE IN CO, HI, NE, OH, OK, OR; IN ME AND VA, INSURANCE BENEFITS MAY ALSO BE DENIED)

APPLICANT'S SIGNATURE

PRODUCER'S SIGNATURE

Terri DeLauder
KAE

ACORD 125 (7/98)

PLEASE COMPLETE REVERSE SIDE

© ACORD CORPORATION 1993

EXHIBIT

E

[illegible][illegible]

ACORD 125 (7/88)

ACORD COMMERCIAL GENERAL LIABILITY SECTION

DATE
04/25/2005

PRODUCER PHONE (304)926-7400
(A/C, No, Ext)
FAX (304)926-7429
CityInsurance Professionals
3601 MacCorkle Ave. SE
P O Box 1126
Charleston, WV 25324

APPLICANT Lakewood Swim Club
(First Named Insured)

EFFECTIVE DATE 05/10/2005 EXPIRATION DATE 05/10/2006 X DIRECT BILL
FOR COMPANY USE ONLY AGENCY BILL PAYMENT PLAN AUDIT

CODE AGENCY CUSTOMER ID 00009999 SUB CODE

COVERAGES

LIMITS

☒ COMMERCIAL GENERAL LIABILITY
CLAIMS MADE ☒ OCCURRENCE
OWNER'S & CONTRACTOR'S PROTECTIVE

DEDUCTIBLES

PROPERTY DAMAGE \$
BODILY INJURY \$
PER CLAIM
PER OCCURRENCE

GENERAL AGGREGATE \$ 1,000,000
PRODUCTS & COMPLETED OPERATIONS AGGREGATE \$ 1,000,000
PERSONAL & ADVERTISING INJURY \$ 1,000,000
EACH OCCURRENCE \$ 1,000,000
FIRE DAMAGE (Any one fire) \$ 50,000
MEDICAL EXPENSE (Any one person) \$ 5,000
EMPLOYEE BENEFITS \$

PREMIUMS
PREMISES/OPERATIONS
PRODUCTS
OTHER
TOTAL

OTHER COVERAGES, RESTRICTIONS AND/OR ENDORSEMENTS (For hired/non-owned auto coverages attach the Business Auto Section, ACORD 127)
150 Members

SCHEDULE OF HAZARDS

LOCATION	CLASSIFICATION	CLASS CODE	PREMIUM BASIS	TERR	RATE	PREMIUM
					PREM/OPS	PRODUCTS
00001 Swim Club			(U) 1			
00001 Snack Bar (no cooking)			(S) 5,000			

RATING AND PREMIUM BASIS

(S) GROSS SALES - PER \$1,000/SALES

(P) PAYROLL - PER \$1,000/PAY
(A) AREA PER 1,000/SQ FT

(C) TOTAL COST - PER \$1,000/COST
(M) ADMISSIONS - PER 1,000/ADM

(U) UNIT - PER UNIT
(T) OTHER

CLAIMS MADE (Explain all "Yes" responses)

- PROPOSED RETROACTIVE DATE.
- ENTRY DATE INTO UNINTERRUPTED CLAIMS MADE COV
- HAS ANY PRODUCT WORK, ACCIDENT, OR LOCATION BEEN EXCLUDED, UNINSURED OR SELF-INSURED FROM ANY PREVIOUS COVERAGE?
- WAS TAIL COVERAGE PURCHASED UNDER ANY PREVIOUS POLICY?

REMARKS

EMPLOYEE BENEFITS LIABILITY

- DEDUCTIBLE PER CLAIM, \$
- NUMBER OF EMPLOYEES
- NUMBER OF EMPLOYEES COVERED BY EMPLOYEE BENEFITS PLANS.
- RETROACTIVE DATE

REMARKS

CONTRACTORS

EXPLAIN ALL "YES" RESPONSES (For past or present operations)

- 1 DOES APPLICANT DRAW PLANS, DESIGNS, OR SPECIFICATIONS FOR OTHERS?
- 2 DO ANY OPERATIONS INCLUDE BLASTING OR UTILIZE OR STORE EXPLOSIVE MATERIAL?
- 3 DO ANY OPERATIONS INCLUDE EXCAVATION, TUNNELING, UNDERGROUND WORK OR EARTH MOVING?

REMARKS/DESCRIBE THE TYPE OF WORK SUBCONTRACTED \$ PAID TO SUB CONTRACTORS

YES NO

EXPLAIN ALL "YES" RESPONSES (For past or present operations)

YES NO

4. DO YOUR SUBCONTRACTORS CARRY COVERAGES OR LIMITS LESS THAN YOURS?
- 5 ARE SUBCONTRACTORS ALLOWED TO WORK WITHOUT PROVIDING YOU WITH A CERTIFICATE OF INSURANCE?
- 6 DOES APPLICANT LEASE EQUIPMENT TO OTHERS WITH OR WITHOUT OPERATORS?

% OF WORK SUBCONTRACTED

FULL-TIME STAFF

PART-TIME STAFF

PRODUCTS/COMPLETED OPERATIONS

PRODUCTS

ANNUAL GROSS SALES

OF UNITS

TIME IN MARKET

EXPECTED MFR

INTENDED USE

PRINCIPAL COMPONENTS

EXPLAIN ALL "YES" RESPONSES (For any past or present product or operation)

- 1 DOES APPLICANT INSTALL, SERVICE OR DEMONSTRATE PRODUCTS?
- 2 FOREIGN PRODUCTS SOLD, DISTRIBUTED, USED AS COMPONENTS?
- 3 RESEARCH AND DEVELOPMENT CONDUCTED OR NEW PRODUCTS PLANNED?
- 4 GUARANTEES, WARRANTIES, HOLD HARMLESS AGREEMENTS?
- 5 PRODUCTS RELATED TO AIRCRAFT/SPACE INDUSTRY?

PLEASE ATTACH LITERATURE, BROCHURES, LABELS, WARNINGS, ETC

YES NO

EXPLAIN ALL "YES" RESPONSES (For any past or present product or operation)

YES NO

- 6 PRODUCTS RECALLED, DISCONTINUED, CHANGED?
- 7 PRODUCTS OF OTHERS SOLD OR RE-PACKAGED UNDER APPLICANT LABEL?
- 8 PRODUCTS UNDER LABEL OF OTHERS?
- 9 VENDORS COVERAGE REQUIRED?
10. DOES ANY NAMED INSURED SELL TO OTHER NAMED INSURED?

ADDITIONAL INTEREST/CERTIFICATE RECIPIENT

ACORD 45 attached for additional names

INTEREST

RANK

NAME AND ADDRESS

REFERENCE #

CERTIFICATE REQUIRED

INTEREST IN ITEM NUMBER

ADDITIONAL INSURED

LOSS PAYEE

MORTGAGEE

LIENHOLDER

EMPLOYEE AS LESSOR

LOCATION

BUILDING

VEHICLE

BOAT

SCHEDULED ITEM NUMBER

OTHER

ITEM DESCRIPTION

GENERAL INFORMATION

EXPLAIN ALL "YES" RESPONSES (For all past or present operations)

YES NO

EXPLAIN ALL "YES" RESPONSES (For all past or present operations)

YES NO

- 1 ANY MEDICAL FACILITIES PROVIDED OR MEDICAL PROFESSIONALS EMPLOYED OR CONTRACTED?
- 2 ANY EXPOSURE TO RADIOACTIVE/NUCLEAR MATERIALS?
- 3 DO/HAVE PAST, PRESENT OR DISCONTINUED OPERATIONS INVOLVE(D) STORING, TREATING, DISCHARGING, APPLYING, DISPOSING, OR TRANSPORTING OF HAZARDOUS MATERIAL? (e.g., landfills, wastes, fuel tanks, etc)
- 4 ANY OPERATIONS SOLD, ACQUIRED, OR DISCONTINUED IN LAST 5 YEARS?
- 5 MACHINERY OR EQUIPMENT LOANED OR RENTED TO OTHERS?
- 6 ANY WATERCRAFT, DOCKS, FLOATS OWNED, HIRED OR LEASED?
- 7 ANY PARKING FACILITIES OWNED/RENTED?
- 8 IS A FEE CHARGED FOR PARKING?
- 9 RECREATION FACILITIES PROVIDED?
10. IS THERE A SWIMMING POOL ON THE PREMISES?
- 11 SPORTING OR SOCIAL EVENTS SPONSORED?

REMARKS

- 12 ANY STRUCTURAL ALTERATIONS CONTEMPLATED?
- 13 ANY DEMOLITION EXPOSURE CONTEMPLATED?
- 14 HAS APPLICANT BEEN ACTIVE IN OR IS CURRENTLY ACTIVE IN JOINT VENTURES?
- 15 DO YOU LEASE EMPLOYEES TO OR FROM OTHER EMPLOYERS?
- 16 IS THERE A LABOR INTERCHANGE WITH ANY OTHER BUSINESS OR SUBSIDIARIES?
- 17 ARE DAY CARE FACILITIES OPERATED OR CONTROLLED?
- 18 HAVE ANY CRIMES OCCURRED OR BEEN ATTEMPTED ON YOUR PREMISES WITHIN THE LAST THREE YEARS?
- 19 IS THERE A FORMAL, WRITTEN SAFETY AND SECURITY POLICY IN EFFECT?
- 20 DOES THE BUSINESSES' PROMOTIONAL LITERATURE MAKE ANY REPRESENTATIONS ABOUT THE SAFETY OR SECURITY OF THE PREMISES?

ACORD PROPERTY SECTION

DATE
04/25/2005

PRODUCER PHONE (A/C, No, Ext) (304)926-7400
FAX (304)926-7429
CityInsurance Professionals
3601 MacCorkle Ave. SE
P O Box 1126
Charleston, WV 25324

APPLICANT (First Named Insured)
Lakewood Swim Club

EFFECTIVE DATE 05/10/2005 EXPIRATION DATE 05/10/2006 DIRECT BILL X AGENCY BILL
PAYMENT PLAN
AUDIT

CODE SUB CODE

AGENCY CUSTOMER ID

PREMISES INFORMATION PREMISES # 00001 BUILDING # 00001 STREET ADDRESS Lakewood Road

SUBJECT OF INSURANCE	AMOUNT	COINS %	VALUATION	CAUSES OF LOSS	INFLATION GUARD %	DEDUCTIBLE	FORMS AND CONDITIONS TO APPLY
Building	100,000	80RC	Special			1,000	
Business Personal Property	25,000	80RC	Special			1,000	

ADDITIONAL INFORMATION - BUSINESS INCOME/EXTRA EXPENSE

TYPE OF BUSINESS	ORDINARY PAYROLL	POWER/HEAT	EXT PERIOD	BUSINESS INCOME W/O EXTRA EXPENSE	EXTRA EXPENSE
NON MFG	EXCL	INCL	DAYS	TUITION FEES	OFF PREM POWER
MFG	90 DAYS	ELEC MEDIA	NO PERIOD	STUDENTS	POWER
MKG	180 DAYS	DAYS	LIMIT	OTHER ED SERVING	WATER
% COINS	\$	ORD OR LAW	MAX PERIOD		COMM (DESCR BELOW)
NAME AND ADDRESS(ES) FOR OFF PREM POWER OR DEPEND PROP				EXTRA EXPENSE	DEPEND PROP
				LIMIT LOSS PAY	% COIN
					CONT LOC
					REC LOC
					MFG LOC
					LDR LOC (DESCR BELOW)
					DAYS PERIOD REST

ADDITIONAL COVERAGES, OPTIONS, RESTRICTIONS, ENDORSEMENTS AND RATING INFORMATION

CONSTRUCTION TYPE	DISTANCE TO HYDRANT	FIRE STAT	FIRE DISTRICT/CODE NUMBER	PROT CL	# STORIES	# BASMTS	YR BUILT	TOTAL AREA
Joisted masonry	FT	MI		03			1975	1,890
BUILDING IMPROVEMENTS			BLDG CODE GRADE	TAX CODE	ROOF TYPE	OTHER OCCUPANCIES		
WIRING, YR	PLUMBING, YR		WIND CLASS			HEATING BOILER ON PREMISES?	YES	NO
ROOFING, YR	HEATING, YR		RESISTIVE	SEMI RESISTIVE	OTHER	IF YES, IS INSURANCE PLACED ELSEWHERE?	YES	NO
RIGHT EXPOSURE & DISTANCE			LEFT EXPOSURE & DISTANCE			REAR EXPOSURE & DISTANCE		

BURGLAR ALARM TYPE	CERTIFICATE #	EXPIRATION DATE	EXTENT	GRADE	CENTRAL STATION
BURGLAR ALARM INSTALLED AND SERVED BY			# GUARDS/WATCHMEN		WITH KEYS
					CLOCK HOURLY
					CENTRAL STATION
					LOCAL BONG

ADDITIONAL INTERESTS

RANK	NAME AND ADDRESS	EVIDENCE CERTIFICATE	RANK	NAME AND ADDRESS	EVIDENCE CERTIFICATE
INTEREST		POLICY	INTEREST		POLICY
LOSS PAYEE			LOSS PAYEE		
MORTGAGEE			MORTGAGEE		

VALUE REPORTING INFORMATION

REPORTING FORM, PROVIDE AVERAGE VALUES FOR PAST 12 MONTHS	PREMISES/BUILDING	ANY OTHER LOCATION DECLARED AT INCEPTION	ANY OTHER LOCATION ACQUIRED AFTER INCEPTION	PREMISES NOT OWNED OR ACQUIRED LIMIT
SUBJECT OF INSURANCE				

PREMISES INFORMATION

PREMISE 0001 BUILDING # 00002 STREET ADDRESS Lakewood
SUBJECT OF INSURANCE AMOUNT COINS % VALUATION CAUSES OF LOSS INFLATION GUARD % DEDUCTIBLE FORMS AND CONDITIONS TO APPLY
Building 25,000 80RC Special 1,000
Business Personal 5,000 80RC Special 1,000
Property

ADDITIONAL INFORMATION BUSINESS INCOME/EXTRA EXPENSE
TYPE OF BUSINESS ORDINARY PAYROLL POWER/HEAT EXT PERIOD BUSINESS INCOME W/O EXTRA EXPENSE EXTRA EXPENSE
NON MFG EXCL INCL \$ DEO DAYS \$ TUITION FEES OFF PREM POWER DEPEND PROP
MFG 90 DAYS ELEC MEDIA MO PERIOD \$ STUDENTS POWER % COIN
MINING 180 DAYS DAYS \$ LIMIT OTHER ED WATER CONT LOC
% COINS \$ ORD OR LAW MAX PERIOD COMM (DESCR BELOW) REG LOC
MFG LOC
LDR LOC (DESCR BELOW)
NAME AND ADDRESS(ES) FOR OFF PREM POWER OR DEPEND PROP
EXTRA EXPENSE DAYS PERIOD REST
LIMIT LOSS PAY
% % % %

ADDITIONAL COVERAGES, OPTIONS, RESTRICTIONS, ENDORSEMENTS AND RATING INFORMATION

CONSTRUCTION TYPE DISTANCE TO HYDRANT FIRE STAT FIRE DISTRICT/CODE NUMBER PROT CL # STORIES # BASMTS YR BUILT TOTAL AREA
Joisted masonry FT MI BLDG CODE TAX CODE ROOF TYPE 03 1 1975 1,325
BUILDING IMPROVEMENTS PLUMBING, YR HEATING, YR WIND CLASS
*WIRING, YR *OTHER RESISTIVE SEMI-RESISTIVE OTHER HEATING BOILER ON PREMISES? YES NO
RIGHT EXPOSURE & DISTANCE LEFT EXPOSURE & DISTANCE IF YES, IS INSURANCE PLACED ELSEWHERE? YES NO
REAR EXPOSURE & DISTANCE
BURGLAR ALARM TYPE CERTIFICATE # EXPIRATION DATE EXTENT GRADE CENTRAL STATION
BURGLAR ALARM INSTALLED AND SERVICED BY # GUARDS/WATCHMEN WITH KEYS
CLOCK HOURLY
PREMISES FIRE PROTECTION (Sprinklers, Standpipes, COChemical Systems) % SPRINK FIRE ALARM MANUFACTURER CENTRAL STATION
LOCAL GONG

ADDITIONAL INTERESTS

RANK	NAME AND ADDRESS	EVIDENCE CERTIFICATE POLICY	RANK	NAME AND ADDRESS	EVIDENCE CERTIFICATE POLICY
INTEREST			INTEREST		
LOSS PAYEE			LOSS PAYEE		
MORT GAGEE			MORT GAGEE		

VALUE REPORTING INFORMATION

REPORTING FORM PROVIDE AVERAGE VALUES FOR PAST 12 MONTHS
SUBJECT OF INSURANCE PREMISES/BUILDING ANY OTHER LOCATION DECLARED AT INCEPTION ANY OTHER LOCATION ACQUIRED AFTER INCEPTION PREMISES NOT OWNED OR ACQUIRED LIMIT

REMARKS

RECEIVED

MAY 10 2005



MARKEL SOUTHWEST UNDERWRITERS, INC.

SWIM & RACQUET CLUB SUPPLEMENT

(Include Acord application)

Applicant's Name: LAKEWOOD SWIM CLUB INC Location Address: 2088 LAKEWOOD DRIVE
 Mailing Address: PO BOX 132 ST ALBANS WV 25177

Risk is ☒ Swim Club ☐ Tennis Club ☐ Racquetball Club Number of members 175

Is there a pool? ☒ Yes ☐ No Rules posted? ☒ Yes ☐ No Lifeguards? ☒ Yes ☐ No
 Are lifeguards trained/certified in CPR? ☒ Yes ☐ No
 Any diving boards/platforms? ☒ Yes ☐ No If yes, height 2 FT.
 Any slides? ☐ Yes ☒ No If yes, height ---
 Are there depth markers? ☒ Yes ☐ No
 Who is responsible for pool maintenance? POOL MANAGER
 Location of emergency shut off valve. 1 MAIN BUILDING
 Is there a life ring or any other lifesaving equipment at the pool? ☒ Yes ☐ No
 If yes, please describe: BACK BOARD LIFE RING, ROLL - TO PULL SOMEONE OUT
 Any diving competition or diving teams? ☐ Yes ☒ No
 If yes, please describe ---
 Dive instructors? ☐ Yes ☒ No
 If yes, please describe ---
 Does applicant have Workers Compensation coverage in force? ☒ Yes ☐ No
 Does applicant lease employees? ☐ Yes ☒ No Total number of employees 20
 How many tanning beds? 0 Goggles provided? ☐ Yes ☐ No Self timers? ☐ Yes ☐ No
 Are beds U L approved? ☐ Yes ☐ No
 Hours of operation From 10 Am to 7 PM M-S
 If 24 hour service, please advise staffing. W/L
 Is parking lot well lit? ☒ Yes ☐ No
 Number of tennis courts 0 Number of racquetball/handball courts 0
 Any public receipts from hourly rental? ☐ Yes ☒ No If yes, please provide amount \$
 Any show facilities? ☐ Yes ☒ No Do showers have non-skid floors? ☒ Yes ☐ No Sauna or steam? ☐ Yes ☒ No Jacuzzi? ☐ Yes ☒ No
 Describe cleaning schedule DAILY
 Are gymnastics taught? ☐ Yes ☒ No Any trampolines? ☐ Yes ☒ No
 Describe procedure in case of accident. FOLLOW EMERGENCY PROCEDURES
 Are minors permitted to join club? ☐ Yes ☒ No Are child care facilities provided? ☐ Yes ☒ No
 Maximum number of children --- Maximum age --- Activities provided ---
 Is pro shop on premises? ☐ Yes ☒ No If yes, sales \$ --- Is snack bar on premises? ☒ Yes ☐ No If yes, sales \$ 8,500.00
 Any alcohol or glass containers allowed around pool? ☐ Yes ☒ No
 Any outside events sponsored? ☐ Yes ☒ No Special events on or off premises? ☐ Yes ☒ No
 If yes, please describe ---
 Are non-members allowed on the premises? ☒ Yes ☐ No Any non-member receipts? ☒ Yes ☐ No
 If yes, please explain GUEST FEE - FOR MEMBERS CAN PAY TO BRING A GUEST
 Any professional trainers? ☐ Yes ☒ No Number ---
 Any masseuse? ☐ Yes ☒ No If yes: ☐ Employees ☐ Independent contractors
 If independent contractors, are certificates of insurance provided? ☐ Yes ☒ No Number ---

Any person who knowingly and with intent to defraud any insurance company or other person files an application for insurance containing false information, or conceals for the purpose of misleading, information concerning any fact material thereto, commits a fraudulent insurance act, which is a crime. This application does not bind any of the parties to complete the insurance transaction.

Jim Oulam
Applicant's Signature

Theresa Oulam
Producer's Signature

5/10/05
Date

No. 34399

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**MICHAEL BLANKENSHIP and
MISTY BLANKENSHIP,**

Plaintiffs Below,

v.

**BOSTON CULINARY GROUP, INC.
d/b/a DISTINCTIVE GOURMET,**

Defendant/Third-Party Plaintiff Below,

v.

LAKEWOOD SWIM CLUB, INC.,

**Third-Party Defendant/
Fourth-Party Plaintiff Below, Appellant Herein**

v.

EVANSTON INSURANCE COMPANY,

Fourth-Party Defendant Below, Appellee Herein

CERTIFICATE OF SERVICE

I, Heather B. Osborn, certify that on this 12th day of December, 2008, a true and exact copy of the foregoing "**Brief of Appellee Evanston Insurance Company**" has been forwarded to counsel of record, via regular mail, as follows:

Bruce L. Freeman, Esq.
Freeman & Chirtas
P.O. Box 347
1554 Kanawha Blvd., East (25311)
Charleston, WV 25322
Counsel for Michael Blankenship and Misty Blankenship

John R. Fowler, Esq.
John R. Fowler, PLLC
Suite 1190, United Center
500 Virginia Street, East
Charleston, WV 25301
Counsel for Boston Culinary Group

C. Benjamin Salango, Esq.
Preston & Salango, P.L.L.C.
213 Hale Street
Post Office Box 3084
Charleston, West Virginia 25331
Counsel for Lakewood Swim Club

Heather B. Osborn

John F. McCuskey (WV Bar #2431)
Heather B. Osborn (WV Bar #9074)
SHUMAN, MCCUSKEY & SLICER, PLLC
Street: 1411 Virginia Street East, Suite 200 (25301)
Post Office Box 3953
Charleston, West Virginia 25339
(304) 345-1400